No. 4062.

United States
Circuit Court of Appeals
For the Ninth Circuit.

OWEN M. BRUNER COMPANY, a Corporation,
Plaintiff in Error,

vs.

O. R. MENEFEE LUMBER COMPANY, a Corporation, Now Known as ALLEN MURPHY COMPANY, a Corporation,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error to the United States District Court of the District of Oregon.

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The plaintiff in error relies upon four Assignments of Error for a reversal of the judgment of the District Court. Assignments 1 and 4 relate to the jurisdiction of the court. Assignments 2 and 3 relate to the finding that there was a failure to prove agency and to the finding that the contract set out in the complaint was unilateral and lacking in mutuality.

No exception was reserved to any ruling of the court. No request was made for a declaration of law, for findings either general or special, and no objection or exception tendered or saved to the findings signed by the court. No bill of exceptions was served or filed and at the threshold of this case the question arises whether or not there is any question for this court to review.

The brief of the plaintiff is predicated upon the assumption that the findings are special findings. We submit that this assumption is unwarranted. Can any finding be more general than a finding that the plaintiff has failed to sustain the averments of its complaint coupled with the finding that the parties in open court stipulated that the counterclaim set up in defendant's answer was a valid and subsisting claim against the plaintiff in the amount in said answer and counterclaim stated?

In the case of British Queen Mining Company vs. Baker Silver Mining Company, 139 U. S. 222, Mr. Chief Justice Fuller said that the finding in a case tried to a court without a jury must be either general or special. It cannot be both.

We submit that under a fair construction the findings in this case are nothing more nor less than general findings in favor of the defendant, and if considered as general findings, the findings relating to agency and the lack of mutuality may be disregarded. If our construction is right and the findings are nothing more nor less than general findings, then

clearly under the state of the record there is nothing for this court to review. Numerous decisions of this court settle that point, the latest expression of this court being found in the case of Warren et al vs. Bromley, 288 Fed. Rep. 563.

Assuming, however, that the findings are special findings, in the state of the record it is exceedingly doubtful if any question is presented for review.

In H. F. Dangberg Land & Livestock Company vs. Day, 247 Fed. Rep. 477, at page 478 this court said:

> "A jury trial was waived and the court below made special findings of fact in favor of the defendants on the material issues of the case. One of the findings was that on or about March 25, 1913, the Highland Cattle Company, through its duly authorized agent, entered into a contract with the defendants in error which was the written contract which had been deposited in escrow and that no other contract was made. At the close of the testimony there was no request by the plaintiff in error for a finding in its favor on the issues, and by no motion or request did it present to the trial court the question of law whether there was substantial evidence to sustain findings for the defendant. The sufficiency of the evidence to support the findings, therefore, is not open to review in this court. Citing cases. There remains only the question whether there was error in the admission or exclusion of testimony."

It is apparent that a bill of exceptions brought up the evidence in the case from which we have just

quoted. In the instant case there is no bill of exceptions, no request for either general or special findings, declaration of law, objections or exceptions to special findings, or any exception whatsoever.

To the same effect is the decision of this court in Pederson et al vs. United States for the use of Washington Iron Works et al, 253 Fed. Rep. 622. At page 625 the court says:

> "From the foregoing history of the case it is apparent the trial of the issues having been to the court without a jury and no request having been made of the trial court for a ruling that there was no substantial evidence to justify a judgment, the findings upon questions of fact should be accepted by this court, and therefore, the only rulings for review are those made upon matters of law properly presented by a bill of exceptions."

In the case of Hennig vs. Richey, 196 Fed. Rep. 779, the Circuit Court of Appeals for the Eighth Circuit, in a case tried to the court without a jury, held that findings made by a Circuit Court in an action at law cannot be reviewed by the appellate court in the absence of exceptions or a request for other findings. It would, therefore, seem that even if the findings are to be deemed special findings, in the absence of any request by the plaintiff in error for declarations of law or special findings or objections thereto, no question is presented for review.

Waiving, however, for the time the question whether or not the record presents any question for review, the assignments of error are without merit. As heretofore stated, Assignments 1 and 4 relate to the jurisdiction of the District Court, and Assignments 2 and 3 to the findings concerning agency and the lack of mutuality in the contract.

On the Question of Jurisdiction.

We will discuss first the Assignments of Error going to the jurisdiction of the court and submit,

1. United States courts, although possessing only such jurisdiction as may be conferred on them by statute, are regarded as courts of general jurisdiction within the rule that jurisdiction will be presumed.

15 Corpus Juris, page 836, and authorities cited.

2. The question of jurisdiction is determined from the whole record which shows jurisdiction as diversity of citizenship is admitted and the pleadings affirmatively show that the amount in controversy exceeded the sum of $3000.00.

O'Reilly vs. Campbell et al, 116 U. S. 418, 420, 421.
Barry vs. Edmunds, 116 U. S. 550.
Hartog vs. Memory, 116 U. S. 588, 592.
Brent vs. Charles H. Lilly Company, 202 Fed. Rep. 535.

3. Findings are not to be construed with the strictness of special pleadings.

O'Reilly vs. Campbell et al, 116 U. S. 418, 421.

4. Jurisdiction may not be renounced or denied where the facts requisite to confer it appear either directly or by just inference from any part of the record.

Howe vs. Howe & Owen Ball Bearing Co. et al (8 C. C. A.) 154 Fed. 820, 822.
Waite vs. Santa Cruz, 184 U. S. 302, 327.

5. An action may not be dismissed for want of jurisdiction unless the record shows to a legal certainty want of jurisdiction.

Barry vs. Edmunds, 116 U. S. 550.
Hill et al vs. Walker, 167 Fed. 241.

These several points will be discussed together. The complaint has averments showing the diversity of citizenship and that the amount in controversy exceeded the sum of $3000.00. The answer admitted the diversity of citizenship, but denied the amount in controversy. Upon this state of the pleadings jurisdiction affirmatively appears in the record.

The Supreme Court in the case of O'Reilly vs. Campbell, 116 U. S. 418, at pages 420 and 421, speaking through Mr. Justice Field says:

> "Findings are not to be construed with the strictness of special pleadings. It is sufficient if from them all taken together with the pleadings we can see enough upon a fair construction to justify the judgment of the court, notwithstanding their want of precision and the occasional intermixture of matters of fact and conclusions of law. Defects of form should be called to the attention of the trial court by the objecting party and the requisite correction of the findings would seldom be denied."

So in the instant case the findings taken in connection with the pleadings affirmatively show the jurisdiction of the court to render the judgment complained of. Moreover, it is only when the facts upon the record create a legal certainty of lack of jurisdiction that a suit can properly be dismissed. This is held in the case of Barry vs. Edmunds, 116 U. S. 550, and has been repeatedly followed.

In Brent vs. Charles H. Lilly Company, District Court, Western District, Washington, 202 Fed. Rep. 535, Cushman, Judge, it is said:

> "The defendant in its answer pleaded the general issue, as well as an affirmative defense, in which latter the real nature of the differences of the parties as aforesaid developed by the evidence was disclosed. It is considered that the questions apart, this general denial being in issue, plaintiff's right to recover would show the jurisdictional amount to be in controversy for by that denial plaintiff's right to recover anything was disputed."

In Howe vs. Howe & Owen Ball Bearing Company et al, 154 Fed. 820, at page 822, Sanborn, Circuit Judge, says:

> "The jurisdiction of a Federal Court may not be renounced or denied where the facts requisite to confer it appear either directly or by just inference from any part of the record."

These authorities sufficiently show that even taken as special findings the findings are not to be construed with the strictness of a special pleading; that the whole record is to be examined to determine the question of jurisdiction which may not be renounced or denied where the facts requisite to confer it appear either directly or by just inference from any part of the record, and that unless it is made to appear to a legal certainty that the court is without jurisdiction a cause cannot be dismissed.

Section 37 of the Judicial Code, relied upon by the plaintiff in error, is not applicable upon the record made in this case. That section simply authorizes the court when it appears that a suit does not really and substantially involve a controversy properly within the jurisdiction of the court to dismiss it. Here the record affirmatively discloses that the action did involve a controversy within the jurisdiction of the court.

An interesting case interpreting this section of the judicial code is Hill et al vs. Walker, 167 Fed. Rep. 241, C. C. A. Eighth Circuit, opinion by Amidon,

District Judge, where it is held that a proper pleading of jurisdictional facts makes a prima facie case in favor of jurisdiction which continues until evidence is produced which convinces the mind to a legal certainty that the court is in fact without lawful cognizance of the suit. No bill of exceptions accompanies this record and can this court say that evidence was produced showing to a legal certainty that the amount in controversy did not exceed the sum of $3000.00. The very Assignments of Error relied upon by the plaintiff in error set out that the diverse citizenship of the respective parties and the amount in controversy were proved. Transcript of Record, page 34.

The case of Gilbert vs. David, 235 U. S. 561, cited by plaintiff in error, does not support its contention. This was a case in which the court held no more nor less than that where the record in a case dismissed by the District Court for want of jurisdiction on account of the absence of diverse citizenship brings up the testimony, the Supreme Court must consider it and determine whether the trial court rightly decided the question of citizenship.

In this case the record affirmatively shows the jurisdiction of the court and the very fact that the complaint was dismissed with prejudice, and that the court rendered judgment on the counterclaim is a finding of jurisdiction and inconsistent with the contention of the plaintiff that the court was without jurisdiction.

Suffciency of the Findings.

The remaining Assignments of Error relied upon by the plaintiff in error go to the sufficiency of the finding of special agency and the finding of lack of mutuality in the contract. We have already suggested that these assignments are not available to the plaintiff in error. But passing that question and considering the findings as special findings they are amply sufficient to support the judgment. The finding that the plaintiff has failed to sustain the averments of its complaint coupled with the finding that the parties in open court stipulated that the counterclaim set up in defendant's answer was a valid and subsisting claim against the plaintiff in the amount in said answer and counterclaim stated, are sufficient to sustain the judgment without resort to the finding that the alleged agent was without authority and that the contract was lacking in mutuality.

Moreover, the objection of the plaintiff to the finding relating to agency is not well taken. The sufficiency of the evidence to support this finding is not before the court on the instant record.

The argument of the plaintiff is based upon the assumption first that the answer alleges that plaintiff dealt with Ashenfelter as the agent of the defendant, and secondly, that no notice of any claim of limitation of Ashenfelter's power was given plaintiff until about December 18, 1919. Brief of Plaintiff, in Error,

page 23. Upon these assumptions the plaintiff argues that the answer sets forth only secret undisclosed instructions between a principal and agent, and that the record shows that the plaintiff dealt without knowledge thereof and purchased personal property without any knowledge of the limitation of the power of the agent with whom he dealt.

As a matter of fact, the answer alleges that Ashenfelter represented this defendant as a lumber broker and not otherwise. Transcript of Record, page 16.

The answer further alleges that all of the correspondence between the defendant in error and Ashenfelter was communicated to the plaintiff in error who had notice and knowledge thereof, and that in the transaction Ashenfelter was the agent of the plaintiff. Transcript of Record, page 18.

On this state of the pleading it becomes apparent that plaintiff's objection is wholly without foundation. Every presumption is indulged in favor of the sufficiency of a pleading which has not been attacked prior to judgment. If any question existed as to the particular time the correspondence and wires passing between Ashenfelter and this defendant were communicated to the plaintiff it had a remedy in the District Court by a motion to make that portion of the answer more definite and certain. The record will show that it did not resort to such a motion, nor was any objection of any sort or character made to the pleading. In this condition of the record, there-

fore, it is apparent that the objection is wholly lacking in merit.

So much of the brief of plaintiff in error consists of a discussion of the pleadings that it may not be inappropriate to consider an objection to the complaint raised in the trial court. The contract relied upon by the plaintiff in error is set out in haec verba in the complaint. See Transcript of Record, pages 8 and 9. We submit that it is well established that the language of the alleged order controls any conclusions of the pleader concerning its effect.

In Somers vs. Hanson, 78 Ore. 429, Mr. Chief Justice Moore said:

> "When the contract sued upon is set out in haec verba, it will be so construed that its legal effect will be recognized. If the writing is thus declared upon, it is superfluous to state what its legal effect is: 4 Ency. Pl. & Pr. 918. If there be any discrepancy between the averments of a pleading and the terms of a writing properly identified or attached to a statement of facts constituting a cause of action or a defense, the language of the exhibit will control in determining its legal effect: 31 Cyc. 563; Patrick v. Colorado Smelting Co., 20 Colo., 268 (38 Pac. 236); Lewy v. Wilkinson, 135 La. 105, 64 South, 1003). The promissory note having, in effect, been set forth in the complaint in the exact language employed in the negotiable instrument, the allegation of the legal effect of the writing as stated in the pleading must be disregarded as superfluous and variant."

To the same effect is the case of Cranston vs. California Insurance Co., 94 Ore. 369, 373.

Accordingly, it appears from the complaint that the contract sued upon is one with Ashenfelter and not one with the defendant.

At 2 Corpus Juris, page 670, it is said:

> "A contract by an agent should be in the name of his principal, so as to show beyond question that it is the principal who contracts, and not the agent, since the intention of the parties, as legally evidenced by the terms of the contract itself, is always the governing consideration in determining who is bound by the contract. It is not alone sufficient that the agent has authority to bind the principal, but he must in fact make the contract the obligation of the principal in terms, in order to bind him."

The case of Prather v. Ross, 17 Ind. 495 is cited in support of the text. In this case it is held that in order to bind the principal and make it his contract, the instrument must on its face purport to be the contract of the principal and his name must be inserted in it and signed to it, and not merely the name of the agent, although the latter is described as agent in the instrument.

At 2 Corpus Juris, page 682, it is said:

> "Generally the agent and not the principal is personally bound by a contract containing apt words to bind him, if he executes the contract in

> his own name and makes the promises and undertakings his own without any suggestion or indication that he is contracting for another, although he recites that he is an agent or the other party knows that he is such."

These quotations from Corpus Juris are quoted with approval in Cranston vs. California Insurance Co., 94 Ore. 369, 374, which holds that a contract taken in the name of an agent does not bind the principal.

Accordingly, without resort to the evidence it appears from plaintiff's complaint that recovery could not be had against this defendant.

On the Question of Mutuality of the Contract.

The alleged order affirmatively discloses that it is unilateral and lacking in mutuality. The order contains this provision:

> "To be shipped in sizes and lengths *as wanted.* We shall immediately begin a campaign for orders and will send same to you *as soon as we book the business.*" Transcript of Record, page 8.

This left the defendant in error in the position where it could not enforce the order if the price of lumber fell, but on the other hand, under the theory of the plaintiff in error, if the price of lumber rose plaintiff in error could enforce the fulfillment of the order.

At 23 Ruling Case Law, page 1264, discussing the question of mutuality in sales it is said:

> "In case of such a contract the only consideration of which on the one side is the offer or agreement to sell, and on the other the offer or agreement to buy, the obligation of the parties to sell and to buy must be mutual to render the contract binding upon either party."

At page 1265 of the same authority it is said:

> "Unless both are so bound that either could maintain an action against the other for a breach, neither will be bound. It follows that if a seller agrees to deliver such quantities of any commodity as a buyer may choose to order, but the buyer does not agree to order any quantity of such commodity, the contract would be wanting in mutuality and void. The buyer not being bound, the seller would be free to disregard the agreement. To hold otherwise would enable the buyer to give orders and take the commodity if prices fall and to give no orders and refuse to take it if prices should rise."

The Supreme Court of the United States announced the same principle in the case of Dorsey vs. Packwood, 12 Howard 126. In that case the court had under consideration a contract whereby the purchaser of a plantation agreed to transfer to his son-in-law one-half of the plantation as soon as the son-in-law should pay for one-half the cost of said property either with his own private means or with one-

half of the profits of the plantation. The court held that the contract was deficient in mutuality.

In American Cotton Oil Company vs. Kirk, Circuit Court of Appeals, 7th Circuit, 68 Federal Reporter 791, the court held that a contract to sell and deliver ten thousand barrels of oil at a stipulated price in such quantities per week as the buyer may desire, to be paid for as delivered, but which contains no agreement on the part of the buyer to purchase and receive any particular quantity of oil, is not binding for want of mutuality. In reaching this conclusion reference is made to Dorsey vs. Packwood, supra.

In the case of Crane et al vs. C. Crane & Company, Circuit Court of Appeals, Seventh Circuit, 105 Federal Reporter 869, opinion by Judge Grosscup, the court held that an agreement of a wholesale dealer to supply a retailer during a certain time at stated prices with so much of a commodity as the purchaser might require for his trade, and which left it practically optional with the purchaser to increase or diminish his orders with the rise or fall of prices as might be most to his advantage and the corresponding disadvantage of the seller, was void for want of mutuality.

In T. W. Jenkins & Company vs. Anaheim Sugar Company, District Court, Southern District of California, 237 Federal Reporter 279, the court held that an agreement of a wholesale grocer to buy all the sugar that it would require during the month of Aug-

ust from the defendant at a fixed price was invalid for want of mutuality, and notwithstanding the rule that a detriment to the promisee will operate as a consideration the agreement by plaintiff to purchase only from defendant was no consideration for plaintiff's business was such that it would not desire or require sugar unless it could be resold at an advance, and, therefore, plaintiff could not be required to purchase any sugar so long as it refrained from purchasing from others than the defendant. The opinion of the court was rendered by Judge Bledsoe. It is a well considered opinion and numerous authorities are cited to sustain his conclusion. Among other authorities he quotes the following language of Judge Grosscup in Crane vs. Crane, supra:

> "Plaintiffs in error were at the time engaged in no manufacture or business that required dock oak lumber as an incidental supply, nor were they under any contract to deliver such lumber to third persons at fixed prices. They were lumber merchants pure and simple—middlemen between the defendant in error and such customers as usually come to a merchant. Should the contract under discussion be upheld the plaintiffs in error would be held to occupy this advantageous situation. If the prices of dock oak lumber rose there would be that much increase in ratio of profits and probably coming into a situation to outbid competitors increase also the quantum of orders; if, on the other hand, prices fell below the range of profits the orders could be wholly discontinued. On the contrary, the situation of

> the defendant in error would be this: Should prices fall it could not compel the plaintiffs in error to give further orders; but should prices rise the orders sent in would be compulsory and the loss measured both by the increase of the ratio of profits and the probable increase of the quantum of orders. It is needless to say that such a contract is unilateral and void for want of mutuality. It, in effect, binds the defendant in error alone, for it leaves the plaintiffs in error—whose whole interest is embodied in the prices obtainable—a situation either to go on or to discontinue as such interest develops."

In Interstate Iron & Steel Company vs. Northwestern Bridge and Iron Company, Circuit Court of Appeals, Seventh Circuit, decided January 3, 1922, 278 Federal Reporter 51, the court reiterated the principles announced by preceding decisions rendered in its circuit, and in support of its conclusion among other cases referred to the decision of the Circuit Court of Appeals of this Circuit in the case of City of Pocatello vs. Fidelity and Deposit Company of Maryland, 267 Federal Reporter 181. This was a case in which a city contract provided that if the city for any reason failed to sell bonds due to be sold on a contract date it might terminate the contract. The court in an opinion by Hunt, Circuit Judge, held that a contract of such a nature could not be enforced for the reason that it lacked mutuality.

The finding, therefore, that the alleged order was unilateral and wanting in mutuality was a proper finding.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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Attorneys for Defendant in Error.